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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1217

CLAUDE BIRTLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The petitioner, Claude Birtle, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 30, 1975, affirming the judgment of conviction of the District Court, and the

order of that Honorable Court of Appeals entered in this proceeding on January 8, 1976, denying his petition for rehearing.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals is not reported. It appears in the Appendix, attached hereto, as Appendix A. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of conviction of the District Court in the criminal proceeding below, was filed on October 30, 1975. A timely Petition for Rehearing was denied on January 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Is A Defendant Denied Due Process Of Law Where The Government Obtains Both "Quasi" And "Slow" Grants Of Immunity For Those Witnesses Whose Testimony Supports The Prosecution Theory, But Refuses Defense Requests For Grants Of Immunity To Similarly Situated Key Defense Witnesses Who Would Give Testimony Favorable To The Defense And Adverse To The Prosecution?

II

Does The Government Prejudicially Abuse Its Immunity Powers And A Defendant's Due Process Rights By Refusing A Defendant's Request For A Grant Of Immunity To A Key Defense Witness, And Then Immediately After That Defendant Has Been Convicted, Granting Immunity In That Same Case To That Very Same Witness At The Retrial Of Defendant's Codefendant?

CONSTITUTIONAL PROVISION

The Constitutional provision involved is the Fifth Amendment to the United

States Constitution. It provides in pertinent part: "nor shall any person be ... deprived of life, liberty, or property, without due process of law; ...." It is printed in I U.S.C. XLVI.

STATEMENT OF THE CASE

Petitioner, together with Ronald Peccia, John Fannon, Alex Phillips, and Stuart Hopps, was charged in Count I of a three count indictment with conspiracy to transport stolen securities in interstate commerce and pledge the same for a loan, in violation of 18 U.S.C. §371. Petitioner, together with Hopps and Phillips, was charged in Count II of the indictment with pledging said stolen securities as collateral for a loan, in violation of 18 U.S.C. §2315. Petitioner alone was charged in Count III of the indictment with knowingly making a false statement in a loan application, in violation of 18 U.S.C. §1014.

One Foy Ray Moody, whom the government believed was a member of the conspiracy (R.T. 62), and whom the evidence would

show, as noted by the District Court, was "more involved than any other person" (R.T. 779) was not indicted but was designated by the government as a prosecution witness (R.T. 62-64). Prior to trial, Peccia, Fannon, and Phillips, pursuant to plea bargain agreements reached with the prosecution, entered guilty pleas with respect to certain counts of the indictment. Trial thus was had only with respect to Petitioner Birtle and co-defendant Hopps.

The agreement made with respect to Phillips was that if he cooperated in other matters under investigation and if he testified fully, completely, and truthfully in the trial below, the government, at a minimum, would recommend probation and would, at a maximum, dismiss the charges against him (R.T. 336). The agreement made with respect to Peccia was that in return for truthful testimony at trial, the government would recommend that his sentence run concurrent with his sentence in an unrelated case and with still another case then on appeal, and would also send a letter to his parole

board detailing his cooperation in the case at bench (R.T. 644, 733).

At trial the significant prosecution witnesses were Peccia and Phillips. While much of their testimony was mutually inconsistent in important elements, they both testified that all of the five original defendants and Mr. Moody acted together and that Petitioner Birtle and Hopps knew that the bonds in question were stolen because Peccia and Phillips had so informed them. This was the key vital element at the trial. Petitioner Birtle and Hopps, on the other hand, testified in their own behalf and denied criminal activity and knowledge.

Prior to the commencement of the defense, both defense counsel had filed affidavits with respect to the proposed testimony of the aforementioned Foy Ray Moody (C.T. 98-100; 103-5), the unindicted central figure in the asserted criminal activity. Those affidavits related the following information:

Counsel for Hopps averred that on July 11, 1974, he interviewed Mr. Moody.

Mr. Moody, at that time, stated that he had no knowledge of the fact that the subject bonds were stolen (C.T. 98) until he was so informed by agents of the F.B.I. well after March of 1971. He further indicated that Phillips and Peccia had never indicated that the bonds were stolen and that at no time during the course of the subject transaction did he have any reason to believe that the transaction was other than a purely legitimate transaction involving the "renting" or "leasing" of collateral to obtain a loan from the bank for Zion Coporation. All of these statements were directly contradictory to the key testimony of Phillips and Peccia. Mr. Moody further stated that he had been subpoenaed by the government to testify but that upon his arrival at the courthouse he was told by the government attorney that his presence was no longer necessary because the government apparently did not intend to use him as a witness.

The filed affidavit of Petitioner Birtle's counsel further averred that Mr. Moody had stated that "He was ill because the United States Attorney had,

on Saturday, July 13, 1974, spent approximately four (4) hours trying to make him say he had knowledge that the Oklahoma City Bonds in question were stolen, when in truth and in fact, as he had informed the United States Attorney on many occasions, he had no knowledge that said Oklahoma City Bonds were stolen. ... that he had consistently informed the F.B.I. and government counsel in this case that he had no knowledge and had never been so informed by Mr. Phillips and/or Mr. Peccia." (C.T. 104).

During the defense presentation, both defense counsel sought to present as witnesses for the defense, the testimony of said Mr. Moody and the testimony of the previously mentioned Mr. Fannon, the co-defendant who had already entered a plea of guilty. Fannon, likewise, it was indicated, would impeach the testimony of Peccia and Phillips and substantiate the testimony of Petitioner Birtle and Hopps. Both Mr. Moody and Mr. Fannon, however, asserted a Fifth Amendment privilege against self incrimination with respect to all proposed testimony, and those

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claims were upheld by the Court.

It was at this point that the issues here arose. Both defense counsel argued to the Court that a denial of a request of a grant of immunity to Mr. Moody and Mr. Fannon, so as to permit them to testify for the defense, amounted to a basic denial of fairness (R.T. 942-946). The Court itself acknowledged that this was a basic problem in the area. That problem area, in the language of the Court, at R.T. 947-948 was that:

> ". . . if it was a government witness and they wanted him to testify, they would immunize him. When it is a defense witness and they want him to testify, they can't immunize him, and that is where the problem is. That is why it does get to be a balance of fairness. (Par) I think the law is fairly clear on that. The government has a right to do that; the defendants do not have that right."

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Notwithstanding the acknowledgment, however, neither proposed witness was immunized, and Petitioner's motion for mistrial was denied. The assertion by both witnesses of a Fifth Amendment claim thus prevented the defense from offering their vital testimony which would have impeached the key prosecution witnesses and exculpated the defendants.

The jury then, at the conclusion of the proceedings, was unable to reach a verdict as to either defendant with respect to the first two counts of the indictment. A conviction was returned, however, against Petitioner Birtle on the third count of the indictment.

The third count, it should be noted, charged that Petitioner misrepresented his ownership of the bonds in making a loan application. It should be quite clear, therefore, that the jury well could have so found because it believed that Petitioner had knowledge that the bonds were in fact stolen. It should thus also be quite clear, accordingly, that the jury could well have reached the exact opposite conclusion had the testimony of Mr. Moody

and Mr. Fannon, as set forth above, been presented to them.

The last significant episode then occurred after Petitioner's conviction. Defendant Hopps was retried on Counts I and II of the indictment. Astonishingly enough, at that trial, when the testimony of Mr. Fannon could no longer be of aid to Petitioner Birtle as he had already been convicted, the government called the same John Fannon as a witness and informed the Court that immunity authorization had been obtained from the Attorney General and the Court was requested to issue the Order compelling Mr. Fannon's testimony over his Fifth Amendment assertion (R.T. 1466). This Order was signed by the Court (R.T. 1469) and Mr. Fannon testified at the trial, at the conclusion of which Mr. Hopps was acquitted of all charges. The basis given by the Court in acquitting Mr. Hopps was that in light of all of the testimony, he could not believe the testimony of Peccia and Phillips to the point that he believed the defendant guilty beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

The Decision Below Mistakenly Fails To Address The Substantial Constitutional Issues Presented. The Result Reached Is In Conflict In Principle With Decisions Of Other Circuit Courts Of Appeals And Impermissibly Condones Governmental Abuses Of A Defendant's Due Process Rights And The Government's Immunity Powers.

DISCUSSION

The record below clearly reveals a shocking abuse of the government's immunity powers, resulting in the denial to Petitioner of due process of law.

The government's own expressly stated position was that six persons -- Petitioner Birtle, Peccia, Phillips, Fannon, Hopps, and Moody -- had engaged in specific criminal activity. Two of the six -- Peccia and Phillips -- entered into plea bargains conditioned significantly or in whole upon the giving of testimony at trial. At trial, while severly impeached, and giving mutually inconsistent

testimony, each incriminated all of the other five asserted participants.

Petitioner Birtle and Mr. Hopps, on the other hand, went to trial, testified in their own behalf, contradicted the testimony of Peccia and Phillips, and gave evidence as to the non-existence on their own part of any criminal knowledge or activity.

The jury, of course, never had before it the testimony of the remaining two asserted participants -- Fannon and Moody. Fannon, who had already pled guilty, and Moody, who while being severly implicated, was never indicted, asserted their Fifth Amendment privilege and refused to testify, which claims of privilege were upheld by the Court. It is in this context that the constitutional questions surrounding the immunity process arise.

The general rule is, of course, that the trial Court alone has no power without more to grant immunity to a proposed defense witness, and that the government, which has such power, cannot be forced to confer such a grant. (United States v.

Jenkins (9th Cir. 1972) 470 F.2d 1061; Cerda v. United States (9th Cir. 1973) 488 F.2d 720.) Nevertheless, reported decisions have recognized that in certain circumstances the government's use of its immunity powers may be exercised in such a capricious manner that due process would require that the government grant immunity to defense witnesses and that a failure to do so would result in the denial of due process and equal protection.

This principle was recognized by Chief Justice Burger in his Court of Appeals decision in Earl v. United States (D.C. Cir. 1966) 361 F.2d 531. The Court there indicated, at P. 534, Fn.1, that where the government secures testimony favorable to the prosecution under a grant of immunity to an asserted eyewitness to the offense, fundamental concepts of due process might well require that the government confer a grant of immunity to similarly situated defense witnesses so as to enable that evidence to be made available to the defendant (See United States v. Bautista (9th Cir. 1975) 509 F.2d 675). We consider application of

this principle here in two distinct respects.

The first is that the government below purposefully engaged in a deliberate course of testimony purchasing. It obtained, by manner of plea bargains which were virtually equivalent in effect to grants of immunity, the waiver of Fifth Amendment rights and testimony of those established participants who indicated that their testimony would tend to show petitioner's guilt. With respect to similarly situated established participants whose testimony would tend to exculpate petitioner, however, the government not only declined to itself present that testimony, but by refusing to confer grants of immunity, effectively intentionally deprived the defense of the opportunity to offer independent exculpatory evidence.

This systematic purchasing of testimony favorable to the prosecution and exclusion of testimony favorable to the defense, all out of a pool of similarly situated witnesses goes far beyond the simple plea bargain process presented in Earl. Its use here should be held to

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constitute a basic denial of due process of law, notwithstanding the fact that the government circumvented the immunity procedures at the first trial by reaching equivalent plea bargains.

The second respect in which the principle recognized in Earl is applicable to the case at bench concerns the manner in which the government utilized its immunity powers with respect to the proposed testimony of Fannon.

When it was Petitioner Birtle who sought to have Fannon immunized so as to enable the defense to present his exculpatory testimony, the government refused. Yet, after Petitioner Birtle had been convicted without Fannon's testimony, and thus Fannon could no longer give evidence tending to establish Petitioner's innocence, the government itself then sought and received the very same grant of immunity for the very same Fannon, so that Fannon could be a prosecution witness in the retrial of Petitioner's co-defendant Hopps.

It is one thing to say, as the Ninth Circuit Court of Appeals did in Bautista, that where the government does not grant immunity, its failure to grant immunity to a defense witness raises no due process question. It is quite another thing, however, for the government to refuse to immunize a witness because the testimony of that witness is expected to aid the defense, and then grant that very same witness immunity in the very same case when the testimony of that witness can no longer aid the defendant, and is expected then to be favorable to the prosecution.

In this context the government should not be permitted, as it did in Earl, to justify its actions by resort to considerations of the Executive nature of the immunity process. In a very real sense, the government here did grant immunity to favorable witnesses and did deny the same immunity to similarly situated unfavorable witnesses.

The only distinction between the case at bench and the situation contemplated in Earl is that here the government timed its grant to deny Petitioner favorable

testimony.

This Court stated in Brady v. Maryland (1963) 373 U.S. 83, 87, that "(T)he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." The case at bench is such a case and the procedure engaged in below raises doubts of the most extreme and grave nature as to the integrity of the administration of justice.

In all practical terms the government below prevented production of vital defense testimony exculpatory of Petitioner until after a conviction had been obtained by reason of the lack thereof. It then turned around, in the same case, and produced that same testimony only when it could no longer aid the Petitioner, but could only aid the prosecution.

The case at bench thus is not an "immunity" case; rather it is a due process case. It raises the spectre if not the actuality of both government suppression

of evidence and tampering with the administration of justice. The actions of the prosecution here of this nature should be roundly condemned by this Court.

CONCLUSION

For all of these reasons, a Writ of Certiorari should issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN

Counsel for Petitioner

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CLAUDE BIRTLE, *Defendant-Appellant.*	No. 75-1234 MEMORANDUM

[October 30, 1975]

On Appeal from the United States District Court
for the Central District of California

Before: HUFSTEDLER and SNEED, Circuit Judges, and THOMPSON,* District Judge

On this appeal, Appellant makes three contentions:

First, Appellant assigns as error the closing argument of Government counsel, stating that the prosecuting attorney improperly vouched personally for the credibility of the Government witnesses. We have reviewed the transcript and find that the argument did not cross over the line of the impermissible direct assertion of personal opinion or direct vouching of credibility. *Hall v. United States*, 419 F. 2d 582 (5th Cir. 1969); *United States v. Cummings*, 468 F. 2d 274 (9th Cir. 1972). The argument was prompted by and was responsive to defense counsel's attack on the credibility of the witnesses. *Ochoa v. United States*, 167 F. 2d 341 (9th Cir. 1948).

Second, Appellant argues that the conviction was based on perjured testimony. The predicate for this was a statement by the

*Honorable Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

EXHIBIT I

trial judge after a court trial of a co-defendant that he couldn't believe the Government witnesses because they contradicted each other. This is not a finding of perjury or a declaration of which version of the disputed facts was correct. Appellant was convicted by a jury of only the third count of the three-count indictment. The third count charged a false statement in a bank loan application. The testimony which was criticized had slight relevance to this charge and may account for the jury's inability to agree on the first two counts as to which the testimony in question was directly relevant.

Finally, Appellant asserts error because the trial judge ruled out the proffered testimony of a defense witness that it was the custom and practice in the banking industry to investigate the ownership of bonds offered as collateral before making a loan. Defendant had already testified that he knew this to be the practice, the import being that in the light of this knowledge, he would not have made a false statement in the loan application respecting ownership of the bonds. The trial judge acted well within his discretion in sustaining the objection to the proffered testimony, inasmuch as only the defendant's presumed knowledge and not the existence of such a custom or practice had any relevance to the issue.

Affirmed.

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